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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 264

W. HERBERT HOOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 139 F. Supp. 895. The opinion of the Court of Appeals (Pet. 27-35) affirming the judgment of the District Court is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 36-37) was entered on May 29, 1956. On June 7, 1956, Justice Burton extended to July 28 the time within which a petition for certiorari might be filed. The petition was filed on July 19, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether venue lies in one district for the offenses of wilfully attempting to evade income taxes by signing and tendering false tax returns in that district, even though the returns are ultimately filed in another district.

2. Whether the indictment, alleging that petitioner had wilfully attempted to evade his income taxes by signing and tendering false tax returns, charged offenses under Section 145(b) of the Internal Revenue Code of 1939.

3. Whether the trial court unduly restricted defense counsel's cross-examination of a Treasury agent.

4. Whether the trial court erred in refusing an instruction requested by petitioner under which the jury would have been permitted to find him guilty of the misdemeanor proscribed by Section 3616(a) of the Internal Revenue Code of 1939.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon con-

viction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3616.)

18 U.S.C.:

SEC. 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * * * *

Federal Rules of Criminal Procedure:

Rule 31. *Verdict.*

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

On March 9, 1955, a three-count indictment was filed against petitioner in the United States District Court for the Western District of Pennsylvania, charging him with wilful attempts to evade his income taxes for the years 1948, 1949 and 1950, in violation of Section 145(b), Internal Revenue Code of 1939, by signing and tendering to an Internal Revenue Service official at Altoona, Pennsylvania, false and fraudulent income tax returns. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 3a-5a):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1948)	$2,936 93	$140 00	$23,513 00	$7,212 97
Count II (1949)	3,026 97	153 00	21,994 60	6,464 70
Count III (1950)	2,346 15	53 00	14,343 54	3,290 69

After a jury trial, petitioner was found guilty on all counts. On September 8, 1955, the court imposed, with respect to each count, a fine of $2,500 and concurrent prison sentences of one year and one day. (R. 381a.) The Court of Appeals affirmed. (Pet. 27-35.)

The evidence to support the verdict may be sum-

marized very briefly since the petition does not challenge its sufficiency.

Petitioner's reported income consisted entirely of profits from an unincorporated business, known as the Woodbury Milling Company, operated by him. The Government's evidence showed that his true income from that venture amounted to $16,131.40 in 1948, $15,109.45 in 1949, and $6,124.59 in 1950, amounts substantially larger than those reported. (R. 257a-261a, 281a.) Petitioner also had income from dividends, interest, capital gains, insurance gains, annuities, and director's fees. However, on his original returns petitioner failed to report any income from those sources, although dividend income alone amounted to $3,042.30 in 1948, $2,962.53 in 1949, and $4,404.50 in 1950. (R. 252a-256a, 261a-262a.)

Petitioner, who resided in Woodbury, Pennsylvania, located in the Western District of Pennsylvania, prepared his own returns at his residence in each of the years involved. Thereafter, he took the unsigned returns to the Internal Revenue office at Altoona, also located in the Western District of Pennsylvania, handed the return to an official at that office, signed the return where the official indicated, and thereupon turned it over to the Internal Revenue Service official. Altoona is a branch office of the Director (formerly Collector) of Internal Revenue whose main office is located in Philadelphia. A return presented or tendered to the branch office in Altoona is ultimately forwarded to the main office in Philadelphia for filing. (R. 18a, 264a, 281a.)

ARGUMENT

1. Petitioner's first contention (Pet. 11-15) is that, if the allegations in the indictment as to the means of attempted tax evasion, *i.e.*, the signing and tendering of false returns, be assumed to be equivalent to an allegation that the returns were filed, venue was improperly laid in the Western District of Pennsylvania, the returns having been filed in the Eastern District of Pennsylvania. The argument fails because the assumption is clearly untenable (*United States* v. *Aaron*, 117 F. Supp. 952, 954 (N.D. W. Va.)), as petitioner admits. (Pet. 15-16.) Where an indictment under Section 145(b) charges the filing of a false return, venue lies in the district where the ultimate filing takes place. *Holbrook* v. *United States*, 216 F. 2d 238 (C.A. 5th), certiorari denied, 349 U. S. 915; *Wampler* v. *Snyder*, 66 F. 2d 195, 196 (C.A. D.C.); *Bowles* v. *United States*, 73 F. 2d 772, 774 (C.A. 4th), certiorari denied, 294 U. S. 710. But where, as here, the indictment alleges affirmative acts of evasion other than the actual filing of the return, it is plain that venue lies in the district in which those alleged acts took place. In *United States* v. *Albanese*, 224 F. 2d 879, 881-882, the Second Circuit stated, on this precise point:

> The counts, dealing with different years, alleged that the defendants knowingly attempted to evade a part of the taxes owed to the government by preparing, causing to be prepared, and causing to be mailed in the Southern District of New York, and by filing and causing to be filed with the Collector of Internal Revenue in Albany, a false and fraudulent return. The appellant contends that, since the returns were filed in Albany, proper

> venue is in the Northern District of New York. But the crime specified by 26 U.S.C. § 145(b) is an "attempt in any manner to evade or defeat any tax." The actual act of filing is not an essential element of the offense. The defendant's entire course of conduct in the Southern District of New York, from preparing false records to the mailing of false returns, came within the ambit of the "attempts" statute, and venue was thus proper.

See, also, *United States* v. *Newton*, 68 F. Supp. 952, 953-954 (W.D. Va.), affirmed, 162 F. 2d 795 (C.A. 4th), certiorari denied, 333 U. S. 848.

Petitioner argues (Pet. 13) that "it cannot be supposed that Congress intended to leave it to the Attorney General" to decide whether a taxpayer shall be prosecuted in the district "where he hands in his return for transmission or in the district where his return is required to be filed." The short answer is that Congress has already conferred such power in a statute (18 U.S.C., Sec. 3237, *supra*, p. 3) which provides that offenses begun in one district and completed in another may be prosecuted in either.

Petitioner alleges (Pet. 12-13) a conflict between the Fourth and Sixth Circuits, comparing *Bowles* v. *United States*, *supra* and *Wampler* v. *Snyder*, *supra*, with *United States* v. *United States District Court*, 209 F. 2d 575 (C.A. 6th). In the *Bowles* and *Wampler* cases, the Fourth Circuit held merely that where the indictment alleges the filing of a false return as the means of evasion venue lies in the district where it is filed. There was no question in either case as to whether an indictment might properly have been brought in another district charging affirmative acts of evasion com-

mitted there. In *United States* v. *United States District Court, supra*, the Sixth Circuit held that the case was properly transferred at the defendant's request, under Rule 21(b) of the Federal Rules of Criminal Procedure, from the filing district to another district in which, according to the bill of particulars, many affirmative acts of evasion took place. These cases are in harmony with each other and with the holding of the court below in the instant case. (Pet. 29-30.) We do not find the "confusion in the precedents" of which petitioner speaks. (Pet. 11.) [1]

2. Petitioner argues (Pet. 15-18) that the indictment fails to allege offenses under Section 145(b). Each count charged (R. 3a-5a) that petitioner wilfully attempted to evade and defeat his income taxes by "signing and tendering to an Internal Revenue Service official at Altoona, Pennsylvania, a false and fraudulent income tax return." Plainly, these allegations were sufficient to charge violations of Section 145(b), which proscribes any attempt to evade or defeat income taxes "in any manner." *United States* v. *Albanese, supra*, *United States* v. *Newton, supra*. Cf. *Spies* v. *United States*, 317 U. S. 492; *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45-46.

3. Equally without merit is the argument (Pet. 18-22) that defense counsel was unduly restricted in his

[1] Petitioner complains (Pet. 12) that with respect to Count I of the indictment a complaint was filed against him in the Eastern District of Pennsylvania alleging the filing of a false return and that this was later dismissed and a complaint filed in the Western District alleging the tendering of a false return. (See R. 294a-297a.) He does not undertake to explain the relevance to his argument of the filing and dismissal of the first complaint, however, and we do not understand him to contend that it prejudiced him in any way.

cross-examination of one of the investigating agents. The agent had testified on direct examination (R. 280a-288a) as to certain admissions petitioner had made to him during the investigation. On cross-examination, under the guise of testing the agent's recollection, defense counsel began to read questions and answers from what appeared to be a transcript of one of the interviews. The transcript, which was never identified, had not been used by the Government. On the Government's objection, the judge refused to permit defense counsel to read questions and answers from the alleged transcript and from asking about petitioner's answers during the interview until it was first shown that those answers related to the agent's direct testimony. (R. 289a-291a.) Defense counsel did not press the point but began to relate his questions to the matters covered in the direct examination of the witness, after which he elicited the desired testimony without further interruption. (R. 291a-300a.)

The argument is now made (Pet. 19) that "[w]hat was involved was not, as the trial judge thought, a matter of impeaching the special agent; the obvious issue was adducing the complete text of the three conversations." If the court was confused it was the fault of defense counsel, who explained his purpose as follows (R. 291a):

> These are additional statements that Mr. Hoover gave in terms of replies, some replies he says that Mr. Hoover made, I mean, don't go with some of the replies I have here.

And if the purpose was to get the transcripts into evidence it was soon abandoned for petitioner never offered them. He is in no position to complain at this

stage of the proceedings. *Johnson* v. *United States*, 318 U. S. 189, 200-201.

4. Petitioner urges (Pet. 22-24) that the trial court erred in refusing his requested instruction No. 7, which read as follows (R. 371a-372a):

> 7. The crime charged in this indictment is a willful attempt to evade taxes. Therefore, the jury must find the defendant not guilty of the offense charged in the indictment, even if they believe that he delivered a false income tax return with the intent to defeat assessment of tax to the Collector.

Petitioner contends that this was a request for an instruction to which he was entitled by Rule 31(c) of the Federal Rules of Criminal Procedure (*supra*, p. 4), relating to lesser included offenses. It is his theory that the misdemeanor proscribed by Section 3616(a) of the Internal Revenue Code of 1939 (*supra*, p. 3) is an "offense necessarily included" in a violation of Section 145(b). There is no basis, however, for petitioner's attempted distinction of *Berra* v. *United States*, 351 U. S. 131. Moreover, the requested instruction was tantamount to a directed verdict of acquittal. Yet, petitioner does not contend that the evidence was insufficient to support the verdict.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 898443 188